National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 18, 1998

FROM: Sandra Dunbar, Regional Director, Region 3

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: United Steelworkers of America, AFL-CIO, District 4 (Landis Plastics, Inc.), Case 3-CB-7242 and 3-CB-7242-2

506-2001-5000, 536-2501

These cases filed were submitted for advice on the following issues: (1) Was Kenneth Mar, an employee, engaged in Section 7 activity when he informed the Employer that Kathy Saumier, another employee, had sexually harassed him; (2) Was Saumier acting as an agent of the Union when she filed a lawsuit against Mar alleging that he had slandered her when he made the above-described report; (3) Does Section 10(b) of the Act bar issuance of complaint on this charge; and (4) whether the Union violated Section 8(b)(1)(A) of the Act by distributing leaftlets in the neighborhoods of two employees who publicly opposed the Union.

FACTS

The Union has been conducting an organizing drive among the employees of Landis Plastics since April 1996. The Union has filed numerous charges since the onset of the organizing drive; and a lengthy unfair labor practice trial was concluded on November 19, 1997. In addition, the Board authorized the Regional Director to seek Section 10(j) injunctive relief; that decision is pending.[(1)]

In late January 1997, Kenneth Mar, an employee of Landis, was summoned to the office of Terry McClelland, the Human Resource Manager, and asked if he had ever been sexually harassed by Kathy Saumier. Mar states that he had never complained to management about Saumier's alleged misconduct and would have never reported it if McClelland had not asked. With some prodding from McClelland, Mar described three incidents in which Saumier had allegedly touched him and/or made sexually explicit remarks to him. Mar gave the Employer a short written statement subsequent to his interview with McClelland. The Employer terminated Saumier on or about November 10, 1997.[(2)] In Case 3-CA-20443-2, the Union alleged that the Employer terminated Kathy Saumier, the Union's most visible and vocal supporter, because of her union activities. Mar provided an affidavit to the NLRB on February 13.

Almost immediately after her terminations, Saumier was hired by the Union, as on hourly, casual employee, to assist in its efforts to organize the Employer's employees. On February 25, Saumier filed a lawsuit accusing Mar of slander and seeking $3 million in damages. Initially, she was represented on the lawsuit by Mairead Connor, of the firm of Statter and Connor, who is the attorney who has represented the Union throughout the organizing campaign. Connor has since been replaced by an attorney with no ties to the Union. In similar fashion, Bond, Schoeneck and King, a Syracuse law firm which has represented Landis on numerous matters involving the organizing drive, made the initial appearance for Mar. That firm was quickly replaced by an attorney with no known ties to Landis. The suit makes no reference to the affidavit Mar gave the NLRB and only cites his roles in providing "false" information to the Employer as the basis for the suit. At no time did the Union ask the court to enjoin Mar from giving an affidavit to the NLRB or testifying at the trial, and the original complaint has never been amended to allege that Mar further slandered Saumier by giving an affidavit or testifying at the trial.

Mar was served with the lawsuit on February 25, at which time the Union issued a press release which resulted in immediate news coverage of the filing.

Saumier testified during the unfair labor practices trial on August 28. On cross examination by the Employer's attorney, Douglas Darch, the following exchange took place:

Q. Alright, now in your testimony you talked several times about the union doing things for you, writing letters, and those letters were in fact, when they were tendered for you for your identification, were signed by Mairead Connor who was acting as an agent of the union when she wrote those letters on your behalf?

A.The attorney for the union.

Q.Right, the attorney for the union.

A.Yes.

Q.And she was acted as attorney for the Union was respect to other matters involving you, other than just the couple of the things that she, that have been introduced into evidence, is that not correct?

A.Yes.

Q.As a matter of fact she filed a lawsuit against Ken Mar?

A.She did, yes.

Q.And she was acting as attorney for the Union.

A.At that time, yes.

The Employer asserts that Saumier's testimony constitutes an admission that Saumier was acting as an agent of the Union when she filed the lawsuit. Therefore, it filed the instant charge on September 2, four days after she testified.

Handbilling

Jane Viencek and Marilyn Payton (Venkus) have served as visible outspoken opponents of the Union since the start of the organizing campaign. Both women, particularly Payton, have been quoted extensively in the local press, with Peyton appearing on the television evening news expressing her views. They have written featured letters to the editor and a picture of Viencek carrying a large anti-union sign appeared prominently in an article in the October 2, 1996 edition of the New York Times.

Viencek is a quality control inspector and has been alleged to be a supervisor and/or agent of the Employer in the consolidated complaint which went to trial. The Employer has denied her supervisory status.

On May 30, the Union distributed leaflets in the neighborhoods of Viencek and Payton, placing them in newspaper tubes throughout the area. The leaflet was in the form of a memo from concerned employees at Landis Plastics to "the Neighbors of Jane Viencek" or the Neighbors of Marilyn Payton." The street address of each woman was revealed on the flyers, and in Viencek's case, the flyer displayed a copy of the New York Times photo. The flyer listed the various "sins" committed by Landis against its employees. The memos concluded by stating, "We need your help, ask your neighbor why she would support these abusive practices." This is no evidence that the Union did any picketing or patrolling while engaged in the distribution of these handbills.

ACTION

We conclude that the charges should be dismissed, absent withdrawal.

As a preliminary matter, we conclude that the charges are not barred by Section 10(b) of the Act. The Board has found no Section 10(b) bar where a lawsuit, although filed outside the section 10(b) period, is maintained within that period. (3)

However, we further conclude that Mar was not engaged in Section 7 activity when he informed the Employer that fellow employee Saumier had sexually harassed him. Assuming, arguendo, that Mar was engaged in protected activity, he was not

engaged in concerted activity. Since there is no collective-bargaining agreement or Section 9(a) representative, this case is more appropriately analyzed under Meyers Industries (4) than under City Disposal Systems. (5) Under Meyers, activity is concerted if it is engaged in with, or on the authority of, other employees and not solely by or on behalf of the employee himself. 268 NLRB at 497. This activity includes talking with other employees to initiate, induce or prepare for group action. However, "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action." 268 NLRB at 498. Thus, an individual employee's ***separate and independent complaint*** *about terms and conditions of employment, is not necessarily concerted under Meyers. For example, in Barmet of Indiana Inc., 284 NLRB 1024 (1989), an OSHA inspector questioned two employees, individually, about whether the employer was requiring them to use respirators. The employees responded, individually, that they were unaware of any respirators or their required use, and individually voiced complaints about defective equipment. As a result, OSHA cited and fined the employer. There was no evidence that the employees had conferred with each other on this safety issue. The Board found that the two employees' participation in the OSHA investigation was not concerted. (6)*

In the instant case, Mar informed on Saumier at management's request. He did not claim to be, nor is there evidence that he was, speaking on behalf of other employees when he responded to the Employer's questions, and he was not demanding or seeking the redress of a grievance. Further, since there is no Section 9(a) representative or collective-bargaining agreement, concertedness can not be presumed from asserting a right under a collective-bargaining agreement. And, the fact that Mar also provided a written statement to the Employer does not make his activity protected and concerted. Cases where the Board has made distinctions between written and oral statements involve an analysis of whether the activity concerns cooperation with the grievance machinery. (7)

Nor could Mar's conversation with the Employer, at the Employer's request, be linked to future participation in Board processes. At the time the Employer questioned Mars, Saumier was still employed by the Employer. The Employer was merely seeking information to justify Saumier's contemplated discharge, which has been alleged as a violation of Section 8(a)(3). There is nothing in the lawsuit which implicates the Board's processes or in any way interferes with Mar's access to the Board.

Since Mar was not engaged in Section 7 activity when he provided information to the Employer about Saumier, Saumier's lawsuit against him does not violate the Act. (8) Finally, we agree with the Region that the Union's peaceful handbilling in the neighborhoods of two outspoken anti-union employees who publicly oppposed the Union was lawful. (9)

The Board does not appear to have addressed the issue of union handbilling, alone, outside the homes of employees. (10) However, in DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, (11) the Supreme Court held that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer. The Court found that a contrary interpretation of the Act would raise serious constitutional questions as the handbills in that case were truthful, urged a wholly legal course of action, and were distributed peacefully. (12)

Here, the Union did not engage in picketing. Rather, the Union peacefully distributed handbills in the neighborhoods of Viencek and Payton. The handbills were placed in newspaper tubes throughout the area. The handbill truthfully advised the public that Viencek and Payton worked for and supported Landis, listed various "sins" of Landis, and requested that their neighbors "Ask your neighbor why she would support these abusive practices". Although the handbills bore Viencek and Payton's addresses, they did not set forth the phone numbers or the names of their family members. (13) Nor did the handbills contain any threats, either direct or subtle. Further, both Viencek and Payton were significant participants in the public debate arising out of the Union's efforts to organize Landis' employees and as such willingly put themselves in the middle of the labor dispute. In these circumstances, the Union's peaceful distribution of handbills was lawful.

Based on the above, the charges should be dismissed, absent withdrawal.

B.J.K.

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[1] The injunction petition seeks, among other things, Saumier's interim reinstatement.

[2] *All dates hereafter are in 1997.*

[3] *Aeronautical Lodge 751 (the Boeing Company), 173 NLRB 450 (1968) (continued prosecution of lawsuit by the filing of several pleadings within the 10(b) period). See also, Professional Assn. of Golf Officials (PGA Tour), 317 NLRB 774 (1995) (Section 10(b) issue was not raised or discussed, but the Board found that the maintenance of a lawsuit that had originated outside the 10(b) period was violative of the Act.)*

[4] *Meyers 11, 281 NLRB 882 (1986), enfd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).*

[5] *465 U.S. 822 (1984).*

[6] *See also Herbert F. Darling, Inc., 287 NLRB 1356 (1988), affd. sub nom. Ewing v. NLRB, 861 F.2d 353 (2d Cir. 1988) (employer lawfully disciplined an employee in the mistaken belief that the complaint had initiated an OSHA inspection, because the employee neither engaged in, nor was suspected of having engaged in, concerted activity.)*

[7] *See e.g. Oil Workers Local 7-103 (DAP, Inc., 269 NLRB 129, 131 (1984) (union unlawfully fined employee-members for consenting to the employer's request for a signed statement about another employee, with knowledge that the employee would likely be fired, under the theory that the employees were cooperating with the grievance machinery).*

[8] *We therefore do not need to reach the agency issue.*

[9] *Viencek is a quality control inspector and has been alleged to be a supervisor and/or agent of the Employer. The Employer has denied her supervisory status. Obviously, if she is eventually determined to be a supervisor, then the Union's peaceful handbilling directed at her would not violate the Act.*

[10] *However, in cases where a violation of Section 8(b)(1)(A) has been found regarding picketing away from the Employer's facility, threats to employees or their families has been a major consideration. See e.g. Kohler Co., 128 NLRB 1062 (1960), reversed on other grounds, 300 F.2d 699 (C.A.D.C. 1962); Local 248, Meat and Allied food Workers (Milwaukee Independent Meat Packers Assn.), 222 NLRB 1032 (1976).*

[11] *485 U.S. 568, 128 LRRM 2001 (1988).*

[12] *485 U.S. at 575-576, 128 LRRM at 2004.*

[13] *Cf. United Mine Workers of America (Aloe Coal Company), 6-CB-8048 (1-3), Advice Memorandum dated Sept. 11, 1990 (union violated Section 8(b)(1)(A) by distributing handbills outside of employee's home in circumstances where the handbills contained his home address, phone number and the names of his spouse and children. However, Advice concluded that the union's peaceful picketing outside of the home was lawful.)*